88-202

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. .....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

VICTOR HERRERA-DIAZ, a minor, by and through his Guardian Ad Litem, JANET MARY HERRERA-DIAZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court err in holding that a minor's medical malpractice cause of action accrued when his mother was told that his cerebral palsy was the result of lack of oxygen at birth, despite the fact that she had no knowledge that such lack of oxygen occurred as the result of some human act or omission?

2. Did the Court err in its application of *United States v. Kubrick* in light of conflicting interpretations by other Circuits as to the meaning of "cause" as it relates to accrual of a medical malpractice cause of action?

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, which is reported, appears in Appendix A.

JURISDICTION

The Ninth Circuit entered its judgment and opinion on May 4, 1988. Petitioners filed their Petition for Writ of Certiorari within ninety days of the Notice of Entry of Judgment. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the following pertinent statutory provisions are set forth in Appendix B infra:

28 U.S.C. Section 2401(b)

STATEMENT OF THE CASE

In this case, a severely brain injured child alleges that his injuries were caused by the medical negligence of Government doctors at his birth.

Petitioner Victor Herrera-Diaz ("Victor") was born on November 8, 1977 at the Naval Regional Medical Center at Camp Pendleton. Victor alleges that as a result of the negligence of Navy medical personnel in managing his mother's pre-term labor and his post-birth resuscitation, he was deprived of oxygen which resulted in severe brain injury and paraplegia.

At the time of Victor's birth, Victor's mother, Janet Herrera-Diaz ("Janet"), was told that Victor was premature and was having some breathing problems. At the time of Victor's discharge from the Naval Medical Center, Navy personnel never said anything about his breathing problems being caused by the acts or omissions of any person. Accordingly, Janet reasonably believed that Victor's injuries were "a thing of God."

It was not until May, 1984, when Victor's attorneys first were able to acquire and review the relevant medical records, that Janet had any reason to believe or suspect that Victor's injuries were the result of anything other than a naturally occurring tragedy.

In accordance with the Federal Tort Claims Act (hereafter, FTCA), Victor filed his claim for damages on June 8, 1984, within 30 days after obtaining the relevant knowl-

edge. His claim was denied on April 8, 1985. Victor then filed his complaint on June 4, 1985.

The Government moved for summary judgment based upon the statute of limitations. That motion was granted by the District Court on July 12, 1986. In essence, the District Court's judgment is based upon its finding that Victor's claim accrued in 1978, approximately six months after Victor's birth, when Janet knew both the *existence* (manifest brain injury) and the *cause* (lack of oxygen to the brain) of Victor's injuries.

Victor then filed a timely notice of appeal to the Ninth Circuit.

The Ninth Circuit Court of Appeals, in a split decision filed May 4, 1988, affirmed the District Court's ruling, dismissing Victor's lawsuit. The majority concluded that Victor's medical malpractice claim accrued in 1978 and that his claim was time barred under 28 U.S.C. section 2401(b).

This petition is presented because conflicts over the interpretation of this Court's analysis under *United States v. Kubrick* have arisen in different Circuit Court of Appeals. Furthermore, the Ninth Circuit, in its published opinion in this case, seems to ignore *Lee v. United States* 485 F.Supp 883 (E.D.N.Y. 1980) and the analysis therein, despite being presented with a virtually identical set of facts.

From a general theoretical perspective, the main question which this Court, respectfully, should address, concerns whether or not a reevaluation and further explanation of the *Kubrick* doctrine is now required given the split of decisions between the Circuits. From a more specific and critical viewpoint, this Court is respectfully requested to clarify the *Kubrick* decision and provide

clear guidance to the Courts and litigants in the area of medical negligence claims vis a vis the concept of "cause" sufficient to trigger a reasonable person's suspicion that an injury was caused by human neglect.

ARGUMENT

I.

SUMMARY OF ARGUMENT

Case precedent in actions for medical malpractice under the Federal Tort Claims Act has established that a cause of action accrues when the prospective plaintiff first knew or should have known of his injury and its cause.

In this case, petitioner concedes the first element, knowledge of injury. Janet Herrera-Diaz was told that Victor had Cerebral Palsy in 1978. Therefore, from an analytical standpoint, if knowledge of injury is the only factor to start the running of the statute of limitations, Victor's claim filed in June 1984 was clearly untimely. However, the analysis must continue to determine when, in the course of Victor's life, his mother first had knowledge of sufficient "critical facts" to alert her that the cause of Victor's cerebral palsy was a human act or omission.

Victor contends that his mother did not know the true cause of his injuries, until she was told that same were the result of mismanagement of labor and negligence on the part of government doctors. This knowledge was first imparted to her in May of 1984 by her attorneys. Prior to that time, she only knew of Victor's injury, and its technical cause, lack of oxygen; she did not know or suspect that human acts or omissions were the cause of same. Therefore, Victor's cause of action could not have

accrued at any time prior to May of 1984 as the "critical facts" of Victor's injury and cause were not known.

II.

Victor's Claim Was Timely Filed Under *Kubrick*, Which Provides The Rule For Determining When A Cause Of Action For Medical Negligence Accrues.

The FTCA requires an injured party to file a claim prior to instituting suit. Pursuant to 28 U.S.C. section 2401(b), the injured party has two years *from the date the claim accrues* to file such a claim. *Accrual* of the claim is the critical determining factor with respect to timeliness.

In 1979, this Court, in *United States v. Kubrick,* 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), set forth the standard for determining when a claim of medical negligence first accrues. The test is: the claim accrues when the claimant knows both the *existence* and the *cause* of his injuries.

In *Kubrick, supra,* the plaintiff was treated with neomycin for a leg infection. Six weeks later, he heard ringing in his ears and suffered a loss of hearing. In June, 1971, another doctor told Kubrick that the neomycin had caused his deafness, that it should never have been used, and that the V.A. was negligent. In 1972, Kubrick filed his claim which was held barred. The Supreme Court reversed the lower courts, holding that the claim had accrued in January, 1969 when Kubrick was aware of his injury and its probable cause. Kubrick's claim was held to have accrued when he discovered the "critical facts" of *both* his injury and its cause.

III.

Lee Addresses A Virtually Identical Fact Situation And Demonstrates Victor's Cause Of Action Accrued Within Two Years Of Filing His Action.

The Court in *Lee v. United States,* 485 F.Supp. 883 (E.D.N.Y. 1980), analyzed *Kubrick, supra,* and then applied that analysis to a medical negligence case involving birth injuries to a baby.

Kristen Lee, an eight-year-old retarded girl, brought suit for injuries alleged to have occurred during her delivery and post-birth care on November 6, 1973. Her father, an Air Force sergeant and physical therapist, was told immediately after her delivery that Kristen "had decreased levels of oxygen to the brain at a crucial time around the perinatal time," and indications were that she might be suffering from brain damage. *Lee, supra,* at 885. Her father was also told that Kristen had difficulty breathing and in obtaining oxygen because she had fluid in her lungs.

In December, 1974, when Kristen was thirteen months old, her parents were again told that her prognosis was guarded and that her neurological process slow "because of the aspiration syndrome and because of the delivery and the possibility of lack of oxygen." *Lee, supra,* at 885. It was not until May 6, 1975, when another doctor saw Kristen, *and reviewed her medical records,* that her parents were told that Kristen's problem was not genetic or hereditary or caused by anything they had done, but due to an "insult at the time of birth." *Lee, supra,* at 885. Later, in January, 1977, her parents were told by yet another doctor that the cause of Kristen's brain damage was mismanagement of the delivery.

Following *Kubrick, supra,* the *Lee* court held that the Lee's FTCA claim was timely filed. Although her parents were told at the time of birth that she had difficulties breathing and that there was fluid in her lungs, the court held that "there was no showing that they knew within two years before filing their claim that the problem was not genetic or hereditary but rather was due to 'an insult at the time of birth.' " *Lee, supra,* at 883. Therefore, it was not until May 6, 1975, that the Lees' first discovered the "critical facts" of both their child's injury and its cause, thus commencing the accrual of her cause of action.

More importantly, the *Lee* Court determined that in an action for medical negligence, the "cause" which is at issue is the act of the defendant which gave rise to the injury.

IV.

Victor's Mother Did Not Know Or Have Reason To Suspect That Any Act Or Omissions By Navy Personnel Caused Or Contributed To Causing Victor's Lack Of Oxygen At Birth Until May, 1984 When Her Lawyers So Informed Her.

Victor's mother, Janet Herrera-Diaz, was 22 years old when Victor was born. Her marriage was breaking up because her husband beat her and was seeing another woman. She had just delivered a baby that was so sick he had to be transferred to a civilian specialty hospital.

The Navy obstetrician who delivered Victor never came back to see Janet after Victor's birth. She spent the next five months virtually living at Children's Hospital of San Diego after the Navy transferred Victor to that facility. When Victor was well enough to leave, his mother left California to return to her parents' home in New York. All

during that time, no doctor, pediatrician or nurse from the Navy ever came to her and told her anything about how the lack of oxygen Victor experienced during birth had caused or could have caused any problems. Instead, she was told that Victor was premature, he could have problems and that she should learn to live with it.

When asked by the Government's attorney at her deposition about what she thought the cause of Victor's brain injury was, she stated:

> "Let me say this, when I found out my son was that way, I thought it was just a thing that happened to him. I didn't think the doctors — I didn't think anything was wrong with him until I met — I spoke to Mr. McNulty. Then now, I do feel that, yes, you know, but at the time, I thought it was a thing of God. That's why my son was like that. I didn't think that — no, I didn't blame it on, but —"

While Janet Herrera-Diaz knew that Victor's problems were somehow caused by lack of oxygen at birth, she did not know, until her attorneys told her, what caused that lack of oxygen. Furthermore, given the bare minimum, technical information she was provided with, it was reasonable to believe that Victor's problems were a naturally occurring phenomenon rather than any act of human neglect. She was quite clearly, blamelessly ignorant of any human involvement.

V.

Under Both *Kubrick* and *Lee*, Victor's Claim Was Timely Filed.

The Courts in *Kubrick, supra,* and *Lee, supra,* held that a cause of action for medical negligence did not accrue until after the claimant had been *told by a physician, who*

had reviewed the relevant medical records, that the injury or condition was probably caused by some act or omission of a government agent or employee (e.g., use of neomycin).

In *Lee, supra,* the Government tried to argue that "it [was] enough" to satisfy the *Kubrick* accrual test "that Lee knew that fluid in the lungs was the injury's cause." *Lee, supra,* at 887. The Court, however, rejected that argument and stated:

> "The Supreme Court [in *Kubrick*] plainly did not mean by the 'cause' of the injury to Kubrick to refer to the action of the neomycin on the cells of his body. The Court referred rather to the administration of the drug by the hospital personnel. As the Court indicated, to know the 'cause' the plaintiff must know 'who has inflicted the injury.' In an action for medical negligence the 'cause' which is at issue is the act of the defendant which gave rise to the injury.
>
> "So here in order to bar plaintiffs' claim the government must show not merely that Lee knew within the two years before filing that claim that Kristen had had fluid in her lungs but that she knew or in the exercise of due diligence should reasonably have known that the alleged acts of the hospital doctors brought about the condition." *Id.*

Accordingly, the fact that Victor's mother knew that his condition was linked to a lack of oxygen is of no probative value in determining the accrual of Victor's cause of action. The pertinent question is whether she knew, or in the exercise of due diligence should reasonably have suspected, that some act or omission on the part of the Navy's medical personnel brought about that condition.

Kristen Lee's father was a physical therapist with training in medicine who knew a lack of oxygen to the brain could cause brain injury and that Kristen had stopped breathing due to her lungs filling with fluid. However, as the Court noted, "the doctors at the base hospital did not volunteer that their *acts* had led to that condition." *Lee, supra,* at 886 (emphasis added).

Victor's mother had only a high school education and no training in medicine or physiology. While she was told that a lack of oxygen was the cause of Victor's condition, she was never informed by the doctors at Camp Pendleton that their acts or omissions had led to that condition. How and why should she suspect same?

The etiology of a child's evolving brain injury is a very complex subject. Even experts in perinatology, neonatology and pediatric neurology have difficulty in identifying cause and effect until a child is older and extensive testing has been completed.

In *Lee, supra,* at 886, the Court stated:

> "The patients may not know that they have been injured or, if they do, they may not know that acts of their doctor have contributed to the injury. The doctor will hardly be inclined to proffer information which may lead to action against him, and relying on his vastly superior knowledge and experience, the patients may be slow to learn the critical facts.
>
> "Plainly then the extent of the patients' knowledge is pertinent to a determination of whether they have had a fair chance to file a timely malpractice claim. And in construing 28 U.S.C. Section 2401(b) the Courts have so held. The latest example is *United States vs. Kubrick,* 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)."

In another post-*Kubrick* case, *Waits v. United States,* 611 F.2d 550 (5th Cir. 1980), the Fifth Circuit held:

> "It is not enough to trigger the statute of limitations that the claimant is aware of his injury if he is unaware of the act or omission which caused the injury. [Citations omitted.] In its most recent consideration of the issue the Supreme Court chose not to disturb this 'blameless ignorance' doctrine as applied to plaintiffs ignorant of the negligent act or injury, but could not condone an extension of the doctrine to protect a plaintiff ignorant only of the legal or medical significance of a known act and injury. *United States v. Kubrick,* 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)."

Another application of this analysis is found in the case of *Jackson v. United States,* 526 F. Supp. 1149 (E.D.Ark. 1981). The Court, in two of its conclusions of law, stated:

> "8. Victor Jackson believed that he suffered a 'stroke' in the natural course of events closely related in time to a surgical procedure in October, 1974; Victor Jackson was unaware of the acts and omissions of the VA Hospital personnel which caused the alleged 'stroke' until some time after March 2, 1977 when lawyers obtained all of the medical records from the VA Hospital.
>
> "9. *Knowledge of the occurrence* of a 'stroke' or a 'cardiac arrest' following a surgical procedure *is not* to be equated with knowledge of negligence, nor is it *to be equated with knowledge of the 'critical facts' concerning causation.*" *Jackson, supra,* at 1153 (emphasis added).

This test, "the knowledge of what acts or omissions caused my injury test," has been applied consistently by the federal courts in post-*Kubrick* decisions. Reference to the pertinent parts of similar cases make this clear:

1. "Doctor Satoloff *secured Kubrick's VA hospital records* and in January 1969 informed Kubrick that it was highly possible that the hearing loss was the result of the neomycin treatment administered at the hospital." *Kubrick, supra,* at 114 (emphasis added). The Court held that in January 1969, Kubrick was aware of his injury and its probable cause. (*Id.*, at 118).

2. "On May 6, 1975, a doctor at North Shore University Hospital saw Kristen and *after reviewing some of the medical records* told the parents that Kristen's problem was not genetic or hereditary or caused by anything they had done but was due to an 'insult at the time of birth.' *Lee, supra,* at 885 (emphasis added). Up until this time, it was held that the government could not show the parents knew or should have known of the probable cause of Kristen's condition.

3. "*Prior to his acquisition of hospital records, Waits was not aware* of the failure of the VA Hospital Laboratory to produce C & S test results or of the decision of the VA doctor to proceed without the benefit of test results .... He knew only that the infection in his leg had not been successfully attacked." *Waits, supra,* at 553.

4. In *Jackson,* "Victor Jackson was unaware of the acts and omissions of the VA Hospital personnel which caused the alleged 'stroke' until some time after March 2, 1977, when lawyers obtained all of the

medical records from the VA Hospital." *Jackson, supra,* at 1153.

The Government while denying liability in this case, contended that Victor's mother, a young, unsophisticated, high school graduate, recently divorced with a brain injured child, having no medical background or training whatsoever, should have been able to discover the culpability of the Navy in rendering care and treatment to Victor simply because she was informed of the technical mechanism of his brain injury. Such a proposition is not only absurd, but flies in the face of reason and common sense. Such an argument is reduced to even further absurdity when it is coupled with the Navy's arguable misdirection as to their culpability for Victor's tragic injuries.

That is why "this Court [in *Kubrick*] chose not to disturb the 'blameless ignorance' doctrine as applied to plaintiffs ignorant of the negligent act or injury." *Waits, supra,* at 552. That is why it remains that:

> "Courts must guard against a premature application of a statute of limitations until such time as a plaintiff has reasonable belief that he has a cause of action against the prospective defendant, and *where that reasonable belief is delayed through the plaintiff's "blameless ignorance"* of the facts of his injury or of the fact *of its probable cause,* the plaintiff will *not* be held to be prejudiced thereby." *Schnurman v. United States,* 490 F.Supp. 429 (E.D.Va. 1980), at Syll. 1.

One's educational background, religious beliefs and experience should be a major factor in determining whether one's ignorance is blameless or not. In *Lee, supra,* Kristen's father, a physical therapist, was held to be blamelessly ignorant of the probable cause of Kristen's

problem until a doctor, after reviewing her medical records, informed them not that the acts of the doctors constituted negligence, but only that the problem was due to the actions of the doctors; "an insult at birth."

Victor's mother, Janet, is not a specialist in obstetrics, pediatric neurology or neonatology, nor does she have any medical training, nor did she have any prior experience in childbirth; Victor was her first child. Janet was only 22 years old and all she was told at the outset was that Victor had respiratory problems due to his prematurity. Thereafter, she was told of possible brain damage and cerebral palsy due to "lack of oxygen." Certainly, the assumption made by the Court in *Lee, supra,* should apply in her case: "The doctor [was and] will hardly be inclined to proffer information which may lead to an action against him." *Lee, supra,* at 886.

As the Court noted in *Kubrick, supra,* a claim accrues when plaintiff knows both the existence and the cause of his injury. As the Court in *Lee, supra,* indicates, the "cause" is the act of a defendant which gave rise to the injury.

The "critical facts" as described by the Supreme Court in *Kubrick, supra,* were not known to Janet Herrera-Diaz until May, 1984. Prior to that, Janet only knew of Victor's injury, brain damage, and its physical cause, lack of oxygen; but not that medical negligence was the cause of the lack of oxygen.

In his dissenting opinion in this case, Judge Norris noted:

> "Second, even if Mrs. Herrera-Diaz knew that a "lack of oxygen" caused Victor's injury, this bare knowledge of the technical medical cause of Victor's injury did not constitute the kind of "knowledge of

cause" which under current case law must exist before the statute of limitations will start to run."

In amplifying his position, Justice Norris stated:

> "The majority apparently believes that any kind of knowledge of cause is sufficient to trigger the statute of limitations. Neither case law nor common sense compels such an simplistic definition of knowledge of cause. To trigger the statute of limitations, a prospective plaintiff must have the sort of knowledge of cause that would lead a reasonable person to investigate whether she might have been the victim of malpractice. Although suspicion of negligence is not required before the statute of limitations starts to run, bare knowledge about the mechanical or technical medical cause of injury (failure of the left ventricle muscle) is not sufficient. At a minimum, a prospective plaintiff must be aware that the injury at issue may have occurred as the result of some human act or omission (the injection of nitroglycerin) and was not merely the result of a natural physical defect. In the absence of knowledge that a human agent may have contributed to the injury, a prospective plaintiff simply has no reason to investigate potential legal remedies, and his cause of action should not accrue."

Relying on the three cases which the majority based its ruling, Justice Norris concluded the record did not demonstrate that Janet was in possession of the necessary "critical facts" before 1984 to start the running of the statute of limitations. Specifically with respect to "cause", Justice Norris stated:

> "Informing Mrs. Herrera-Diaz that lack of oxygen as well as prematurity can cause cerebral palsy did

> nothing more than inform her of a possible technical cause of her son's injury. Discovery of this technical cause simply cannot be deemed sufficient knowledge of cause to trigger the statute of limitations. Without some suggestion that a human agent might have contributed to her son's injury, Mrs. Herrera-Diaz cannot be faulted for not inquiring further about the cause of Victor's cerebral palsy. In other words, the record as it now stands, fails to establish that Mrs. Herrera-Diaz had sufficient knowledge about who inflicted her son's injury. Under the *Kubrick* line of cases such knowledge is a prerequisite to the triggering of the statute of limitations."

As applied to this case, Justice Norris' dissent appropriately follows case precedent and more importantly advocates the well-reasoned result of *Lee v. United States, supra.*

The record herein amply demonstrates that Mrs. Herrera-Diaz simply did not have the "critical facts" regarding the cause of Victor's injury before 1984. Therefore, the Court of Appeals erred in ruling that Victor's claim was time barred.

CONCLUSION

Confusion over the analysis of cases under the *Kubrick* doctrine has arisen in the various Circuits. It is respectfully submitted that the *Kubrick* doctrine needs to be reevaluated and further explicated so that a uniform body of law can be properly applied by all of the Circuits to the betterment of all litigants.

Petitioner contends that the Ninth Circuit erred in its application of the *Kubrick* doctrine and that Victor's claim is not time barred under the FTCA. It is respectfully requested that this Court issue a writ vacating the Ninth Circuit's opinion and remand this case for trial or, alternatively, set the matter for hearing and argument so that this Court can review and further explicate the doctrine and rational of *Kubrick, supra.*

DATED: July 28, 1988.

Respectfully submitted,

PETER J. MCNULTY,
Counsel of Record,

NICK J. KAZANDJIEFF
Attorneys for Petitioner.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6242
D.C. No. CV-85-1385-B

VICTOR HERRERA-DIAZ, a Minor,
by and through his Guardian,
JANET MARY HERRERA-DIAZ,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE NAVY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted
November 10, 1987 — San Diego, California

Filed May 4, 1988

Before: J. Clifford Wallace, William A. Norris and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson; Dissent by Judge Norris

OPINION

SUMMARY

Governmental Torts/Medical Malpractice

Appeal from dismissal of suit as time barred. The court affirmed holding that appellant discovered the source of injury shortly after its cause.

Appellant Victor was born premature in 1977 suffering from breathing problems. His mother, appellant Herrera-

Diaz, made no inquiry regarding these problems or their causes. When he was three months old, Herrera-Diaz was told that Victor had suffered brain damage. She did not inquire as to what might have caused it. In 1978, when Victor was six months old, she was told that Victor had cerebral palsy and it often occurred in premature babies. Six years later she filed an administrative claim for damages. It was denied and she filed the present suit. The suit was dismissed as time barred.

[1] An objective standard determines when a medical malpractice action accrues under the FTCA. The action accrues, and the statute of limitation starts to run, when a plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, both his injury and its cause. [2] Here, under the facts, Herrera-Diaz knew, or in the exercise of reasonable diligence should have discovered, both Victor's injury and its cause. [3] Victor's medical negligence claim accrued in 1978 and is time barred.

The dissent argues that even if Herrera-Diaz knew that a lack of oxygen caused Victor's injury, this bare knowledge of the technical medical cause of Victor's injury did not constitute the kind of "knowledge of cause" which under the current case law must exist before the statute of limitations will start to run.

COUNSEL

Peter J. McNulty, Law Offices of Peter J. McNulty, Bel Air, California, for the plaintiff-appellant.

Kathryn A. Snyder, Assistant United States Attorney, Civil Division, San Diego, California, for the defendant-appellee.

OPINION

THOMPSON, Circuit Judge:

Victor Herrera-Diaz, a youngster who suffers from cerebral palsy, appeals from a summary judgment dismissing his action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq. The district court concluded that Victor's medical negligence claim which he filed in 1984 was barred by the two-year statute of limitations of 28 U.S.C. § 2401(b). The court determined the claim accrued in 1978, approximately six months after Victor was born, at which time Victor's mother discovered that his cerebral palsy probably was caused by a lack of oxygen to his brain at or near the time of his birth.

Victor argues on appeal that (1) his cause of action did not accrue until 1984 when his mother first learned that negligence of Navy medical personnel may have caused his injury; and (2) even if the claim accrued earlier, the government fraudulently concealed and misrepresented the true cause of Victor's injury and this tolled the statute of limitations. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

FACTS

Victor was born two months premature on November 8, 1977 at the Naval Regional Medical Center at Camp Pendleton, California. Approximately seven hours after his birth, Victor was transferred to Children's Hospital in San Diego suffering from what Navy medical personnel described to his mother as "breathing problems." Mrs. Herrera-Diaz made no inquiry regarding these problems or their cause. Victor appeared to her to be somewhat blue and dark in color; she assumed the reported breathing problems were the result of Victor having been born premature.

Victor remained in Children's Hospital for five months. When he was three months old, a treating physician told Mrs. Herrera-Diaz that Victor had suffered brain damage. The physician did not say what might have caused the brain damage and Mrs. Herrera-Diaz did not ask. Regarding her lack of inquiry, she stated. "I guess I really didn't want to know. Brain damage is enough for me. I didn't ask."

In April 1978, Victor and his mother moved to New York where Mrs. Herrera-Diaz' parents lived. When Victor was six months old, doctors at Long Island Jewish Hospital in New York told Mrs. Herrera-Diaz that Victor had cerebral palsy. Mrs. Herrera-Diaz was referred to the United Cerebral Palsy Treatment and Rehabilitation Center to get specialized care for Victor. There Victor was seen by a physician who, in 1978, told Mrs. Herrera-Diaz that Cerebral palsy often occurred in premature babies and was caused by a lack of oxygen to the brain around the time of birth. Mrs. Herrera-Diaz did not inquire as to what had caused the lack of oxygen. She

thought that Victor was "just born like that because that's the way God wanted it." She did not consider the possibility that the lack of oxygen was caused by Navy doctors when Victor was born.

Six years later, in May 1984, Mrs. Herrera Diaz was contacted by her present attorneys and told that Victor might have a claim against the government. Victor's administrative claim for damages was filed June 8, 1984. It was denied April 8, 1985. The present lawsuit was filed June 4, 1985. In it Victor alleged, through Mrs. Herrera-Diaz as his guardian ad litem, that Navy medical personnel had been negligent in managing his delivery, and had fraudulently concealed and misrepresented their "complicity in causing [his] birth injuries."

In dismissing Victor's lawsuit as time barred, the district court determined that Victor's medical negligence claim accrued in 1978 when Mrs. Herrera-Diaz had knowledge that Victor suffered from cerebral palsy which was caused by a lack of oxygen to his brain at or about the time he was born. The district court also dismissed the fraudulent concealment and misrepresentation claim because the government had not waived its sovereign immunity as to this claim. *See* 28 U.S.C. § 2680(h). Finally, the district court dismissed the Department of the Navy as an improper defendant in the suit.

II

ANALYSIS

The FTCA provides that a tort claim against the federal government must be presented to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. § 2401(b). Tort claims usually accrue at the time of a plaintiff's injury. In medical malpractice

actions under the FTCA, however, a claim does not accrue until a plaintiff discovers both the injury and its cause. *United States v. Kubrick,* 444 U.S. 111 (1979). When the injury and its cause are known, the claim accrues even though the plaintiff may not then be aware that the injury may have been negligently inflicted. *Id.* at 123-25.

In *Kubrick,* Veterans Administration doctors treated the plaintiff's leg infection with neomycin. Six weeks later the plaintiff began to suffer a loss of hearing, and approximately seven months after that, in January 1969, while being treated for deafness, doctors advised the plaintiff that it was highly possible the neomycin treatment caused his deafness. In June 1971 a doctor told the plaintiff that neomycin caused his injury and should not have been administered. The plaintiff Kubrick filed his negligence action in 1972.[1] He contended that he did not learn the "cause" of his injury until June 1971 when he was told that the use of neomycin to treat his leg was improper. The Court, however, held the claim time barred. It concluded that the claim accrued in January 1969 when Kubrick discovered the "critical facts" of both his injury and its cause. *Id.* at 122.

Victor attempts to distinguish *Kubrick.* He argues that while the plaintiff in *Kubrick* was aware, more than two years before he presented his claim, that his injury was caused by neomycin administered by Veterans Administration doctors, Victor's mother was not aware that the cause of Victor's injury, a lack of oxygen to the brain, resulted from any act or omission by Navy personnel. Victor's mother believed the lack of oxygen was a "natu-

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[1]Kubrick presented his claim to the Veterans Administration after he filed his complaint. The Veterans Administration denied the claim in April 1973. *See Kubrick,* 444 U.S. at 115 n.4.

ral result" of premature birth. Victor also argues that due to his mother's youth, her separation from her husband soon after Victor was born, and her distress over Victor's condition, she was unable to form a reasonable suspicion of any negligent conduct by Navy medical personnel. Therefore, Victor argues, Mrs. Herrera-Diaz cannot be held to have been placed on notice in 1978 to make any inquiry as to how Victor's injury was caused. We disagree.

[1] Relying on *Kubrick,* we have developed an objective standard to determine when a medical malpractice action accrues under the FTCA. The action accrues, and the statute of limitation starts to run, when a "plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, both his injury and its cause." *Davis v. United States,* 642 F.2d 328, 331 (9th Cir. 1981), *cert. denied,* 455 U.S. 919 (1982).[2]

We applied this standard in *Fernandez v. United States,* 673 F.2d 269 (9th Cir. 1982). There, parents of a child who had developed a jaundiced condition shortly after his birth in 1958 "knew of the nexus between his deficiencies and his jaundice at least as early at 1964." *Id.* at 271. His claim was presented in 1976. We stated that if the parents "had inquired, and if there were merit in the case, presumably they would have learned that there was a possibility that [the child's] diagnosis and treatment came too late [to prevent] the sad after-effects of the jaundice." *Id.* We concluded that the jaundiced child's "parents knew

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[2]The rule is followed in other circuits. *Nemmers v. United States,* 795 F.2d 628, 631 (7th Cir. 1986) (running of the statute of limitations depends upon reactions of the objective, reasonable man); *Arvayo v. United States,* 766 F.2d 1416, 1421-23 (10th Cir. 1985) (parents brought negligence action against government for child's brain damage near birth. Held: reasonable person would have made some type of inquiry).

[by 1964], or had available the means of knowing, all there was to know about the cause of his injuries, and who (the nurses and the doctors who diagnosed and treated his jaundice) were responsible." *Id.* Relying on *Kubrick* and *Davis,* we held that the child's claim was barred by the two-year statute of limitations of 28 U.S.C. § 2401(b). Although the child's parents may have been unaware that his injury was negligently inflicted, "we decline[d] to defer accrual of the claim until fault, as distinguished from injury and cause, [was] determined." *Id.* at 272.

[2] In the present case, Mrs. Herrera-Diaz knew approximately seven hours after Victor was born that he appeared to be blue and dark in color and that he suffered from "breathing problems." When Victor was three months old, Mrs. Herrera-Diaz was told that he had brain damage, but she did not inquire about its cause. By her own admission, she did not really want to know the cause. By 1978, when Victor was approximately six months old, Mrs. Herrera-Diaz was told that Victor suffered from cerebral palsy which was caused by a lack of oxygen to the brain at or near the time of birth. At that time she knew, or in the exercise of reasonable diligence should have discovered, both Victor's injury and its cause. *See Davis v. United States,* 642 F.2d at 331. The two-year statute of limitations began to run at this point. She then had the "burden to ascertain the existence and source of fault within the statutory period. . . . In the absence of fraudulent concealment it [was her] burden, within the statutory period, to determine whether and whom to sue." *Id.* There is no evidence of fraudulent concealment or misrepresentation in the record.

[3] We conclude that Victor's medical negligence claim accrued in 1978, and the district court correctly

dismissed his lawsuit as time barred under 28 U.S.C. § 2401(b).

AFFIRMED.

NORRIS, Circuit Judge, dissenting:

This case requires us to decide when a layperson will be deemed to know enough about the cause of a specific medical condition to be on notice that she may have been the victim of tortious conduct by medical personnel. Our precedents establish a clear-sounding rule: An action for medical malpractice under the FTCA accrues when the prospective plaintiff knew or should have known of her injury and its cause. Applying this standard, the majority holds that the statute of limitations started to run when Mrs. Herrera-Diaz was told six months after Victor's birth that a "lack of oxygen" at or near the time of delivery may have "caused" his cerebral palsy. *Opinion* at 5149.

I agree with the majority that whether Victor Herrera-Diaz's claim is barred by the statute of limitations depends on when Mrs. Herrera-Diaz discovered, or in the exercise of due diligence should have discovered, both her child's injury and its cause. I believe, however, that the majority has erred on two critical counts. First, Mrs. Herrera-Diaz's deposition testimony — upon which the majority exclusively relies — is thoroughly ambiguous about what she was told caused her son's injury. Her testimony cannot fairly be construed as establishing for the purpose of summary judgment that she knew or should have known the cause of Victor's cerebral palsy. Second, even of Mrs. Herrera-Diaz knew that a "lack of oxygen" caused Victor's injury, this bare knowledge of the technical medical cause of Victor's injury did not

constitute the kind of "knowledge of cause" which under current case law must exist before the statute of limitations will start to run.

Although the majority suggests that when Victor was six months old Mrs. Herrera-Diaz was told that a lack of oxygen had caused her son's cerebral palsy, *id.*, her deposition indicates that the information she received was not nearly so definitive.[1] Mrs. Herrera-Diaz testified that

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[1]The relevant part of Mrs. Herrera-Diaz's deposition reads as follows:

> Q But Dr. Quinn or doctors at the United Cerebral Treatment and Rehabilitative Center in Roosevelt, Long Island, they told you that premature babies sometimes develop cerebral palsy?
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> A Yes.
>
> Q And did she also tell you that cerebral palsy can be caused by a lack of oxygen during the baby's delivery?
>
> A To the brain. A lack of oxygen to the brain. And it can come from delivery, she said. And that was that.
>
> Q Did she tell you it might come from some other time than delivery?
>
> A No.
>
> Q Do you understand my question?
>
> A I understand what your are saying. No, I really do not remember her exact words, you know. She was just trying to tell me how children with C.P. get it.
>
> . . . .
>
> Q Now, did Dr. Quinn ever tell you what might have caused this cerebral palsy?
>
> A No.
>
> Q Did you ever ask her what she thought caused it?
>
> A No.
>
> Q Did you have any idea at that point how cerebral palsy happens to a child?

the staff at the United Cerebral Treatment and Rehabilitation Center told her both that premature babies sometimes develop cerebral palsy and that cerebral palsy can result from a lack of oxygen at the time of delivery. It is entirely unclear from the deposition that the lack of oxygen problem was presented as a separate possible cause of the injury as opposed to simply being a part of the natural physical difficulties attendent to prematurity. Indeed, the information that Mrs. Herrera-Diaz received, as related in her deposition, was wholly consistent with an initial belief that Victor's injuries were a natural result of his premature delivery. In short, Mrs. Herrera-Diaz's deposition, when viewed in the light most favorable to her, does not establish that she was put on notice that lack of oxygen was anything other than a function of prematurity.

Even assuming, however, that Mrs. Herrera-Diaz knew or should have known that a lack of oxygen caused Victor's injury, in my view this is not the sort of "knowledge of cause" sufficient to trigger the statute of limitations. Knowledge of cause, like the definition of cause itself, is a slippery concept. The cause of every medical injury may be described with equal accuracy in a virtually infinite number of ways "embracing everything that has ever occurred commencing with the ultimate cause of causes up until the present instant." *Lee v. United States,*

A No, till she told me. She told me that premature babies it happens to. And a lack of oxygen. And that's it.

Q Lack of oxygen? What does lack of oxygen mean?

A That's what she said, lack of oxygen.

Q What does that mean to you, lack of oxygen? When or where?

A Delivery. When I found out he had that, I just thought it was because there was — it was meant for him to be like this. . . .

485 F. Supp. 883, 887 (E.D.N.Y. 1980). To take a simple hypothetical malpractice case, the cause of a prospective plaintiff's heart attack might be described variously as 1) the failure of the left ventrical muscle, 2) the failure of the heart muscle in response to an injection of nitroglycerin, or 3) the negligent administration of nitroglycerin by the plaintiff's physician. Similarly, a prospective plaintiff's knowledge of cause may range from nothing more than an awareness of the purely medical or scientific explanation for an injury to an informed belief that an injury was caused by actual negligence on the part of an attending doctor.

The majority apparently believes that any kind of knowledge of cause is sufficient to trigger the statute of limitations. Neither case law nor common sense compels such an simplistic definition of knowledge of cause. To trigger the statute of limitations, a prospective plaintiff must have the sort of knowledge of cause that would lead a reasonable person to investigate whether she might have been the victim of malpractice. Although suspicion of negligence is not required before the statute of limitations starts to run, bare knowledge about the mechanical or technical medical cause of injury (failure of the left ventricle muscle) is not sufficient. At a minimum, a prospective plaintiff must be aware that the injury at issue may have occurred as the result of some human act or omission (the injection of nitroglycerin) and was not merely the result of a natural physical defect. In the absence of knowledge that a human agent may have contributed to the injury, a prospective plaintiff simply has no reason to investigate potential legal remedies, and his cause of action should not accrue.

This reading of what knowledge is required to trigger the statute of limitations follows logically from the three

cases upon which the majority rests its holding — *United States v. Kubrick*, 444 U.S. 111 (1980), *Davis v. United States*, 642 F.2d 328 (9th Cir. 1981), and *Fernandez v. United States*, 673 F.2d 269 (9th Cir. 1982). In *Kubrick*, a doctor had injected plaintiff's infected femur with neomycin. After Kubrick began to suffer from substantial hearing loss, a second doctor informed him that his hearing impairment probably resulted from the neomycin treatment. Kubrick argued and the Court of Appeals held that he should not be deemed to have had sufficient knowledge of cause until he knew or could be reasonably expected to know that the neomycin treatment constituted medical malpractice. The Supreme Court disagreed, holding that it was sufficient to trigger the statute of limitations that Kubrick knew "that he ha[d] been hurt and who ha[d] inflicted the injury." *Kubrick*, 444 U.S. at 122. Armed with these critical facts, Kubrick "need only have made inquiry among doctors with average training and experience in such matters to have discovered that he probably had a good cause of action." *Id.* at 122-23. In holding that Kubrick's claim accrued when he discovered the "cause" of his injury, the Supreme Court plainly was not making reference to the chemical action of neomycin on Kubrick's body, but rather to the administration of the drug by identifiable hospital personnel. Under *Kubrick*, the statute of limitations will not start to run until the prospective plaintiff "can protect himself by seeking advice in the medical and legal community." *Id.* at 123. Without knowledge of the human participation in the causation of his injury, Kubrick could enjoy no such protection.

Our circuit's decision in *Davis*, following *Kubrick*, also rests on the fact that the plaintiff had sufficient knowledge of the human cause of his injury to inquire about possible negligence. In *Davis*, the plaintiff had contracted polio after receiving the Sabin vaccine. We held that

Davis's action accrued after he knew that he had contracted polio and that the Sabin vaccine had caused his injury. Our court rejected Davis's argument that the action should not accrue until he had reason to believe that the United States had been negligent in approving the particular batch of the vaccine from which he had been immunized. As in *Kubrick,* the plaintiff in *Davis* clearly was armed with the critical facts about his injury and could reasonably be expected to inquire about whether and whom to sue. *Davis,* 642 F.2d at 331.

Fernandez, upon which the majority places special emphasis, similarly applies the *Kubrick* analysis. On the third day of his life, Mark Fernandez, a prematurely born infant, was discovered to have developed jaundice. His doctors then embarked on an elaborate course of testing and treatment including several blood transfusions. Mark's condition ultimately stabilized and he was released from the hospital at which time Mark's parents were given a summary of his treatment for jaundice. Within the first 2½ years of his life, Mark developed a variety of physical and mental impairments which his mother explicitly recognized as having been caused by the jaundice. *Fernandez,* 673 F.2d at 270-71.

Over 12 years later, the Fernandez filed suit under the FTCA. In ruling that the statute of limitations barred the Fernandez' claim, we noted that for at least twelve years Mark's parents knew or had the means of knowing "all there was to know about the cause of his injuries, and who (the nurses and doctors who diagnosed and treated his jaundice) were responsible." *Fernandez,* 673 F.2d at 271. Following *Kubrick* and *Davis,* "we decline[d] to defer accrual of the claim until fault, as distinguished from injury and cause, [was] determined." *Id.* at 272. And quoting *Kubrick,* we held that the Fernandz were in

"possession of the critical facts that [their son] ha[d] been hurt and who ha[d] inflicted the injury" and could "protect [themselves] by seeking advice in the medical and legal community." *Id.* at 271-72.

In sum, *Kubrick, Davis,* and *Fernandez* stand for two propositions: first, that suspicion of negligence is not required before the statute of limitations starts to run; and second, that the statute of limitations will not run until a prospective plaintiff is in possession "of the critical facts that he has been hurt and who has inflicted the injury." Absent this sort of knowledge of cause, a prospective plaintiff simply has no notice that he may have a valid lawsuit. *See Lee* 485 F. Supp. at 887 ("In an action for medical negligence the 'cause' which is at issue is the act of the defendant which gave rise to the injury").

Mrs. Herrera-Diaz, as distinguished from the plaintiffs in *Kubrick, Davis* and *Fernandez,* simply was not in command, nor should she have been in command, of sufficient knowledge about the cause of her son's injury to prompt an inquiry into potential malpractice. Nothing that she was told by various medical personnel, including the fact that cerebral palsy may be caused by a lack of oxygen at birth, ever alerted her to the possibility that her doctors, by either act or omission, might have been negligent in handling Victor's birth. In my view, a layperson might reasonably have believed, as Mrs. Herrera-Diaz apparently did, that Victor's cerebral palsy was fully explicable as the result of a purely natural cause — his serious prematurity. Informing Mrs. Herrera-Diaz that lack of oxygen as well as prematurity can cause cerebral palsy did nothing more than inform her of a possible technical cause of her son's injury. *See Lee,* 495 F. Supp. at 887 (parent told that newborn had difficulty breathing, fluid in the lungs and had experienced decreased levels of

oxygen to the brain "could reasonably have believed that the condition was wholly unrelated to anything the doctors did"). Discovery of this technical cause simply cannot be deemed sufficient knowledge of cause to trigger the statute of limitations. Without some suggestion that a human agent might have contributed to her son's injury, Mrs. Herrera-Diaz cannot be faulted for not inquiring further about the cause of Victor's cerebral palsy. In other words, the record as it now stands fails to establish that Mrs. Herrera-Diaz had sufficient knowledge about who inflicted her son's injury. Under the *Kubrick* line of cases such knowledge is a prerequisite to the triggering of the statute of limitations.

I dissent.

APPENDIX B

28 U.S.C. Section 2401 (b). Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time of claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 28, 1988, I served the within Petition for Writ of Certiorari in re: "Victor Herrera-Dias vs. United States of America" in the United States Supreme Court, October Term 1988, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

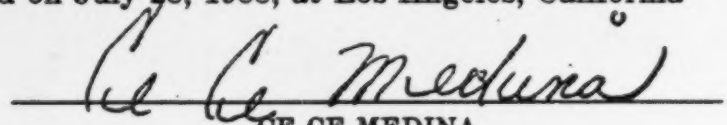
Peter K. Nunet
United States Attorney
Kathryn A. Snyder
Assistant U.S. Attorney

United States Courthouse
940 Front Street, Rm. 6-N-6
San Diego, CA 92189-0150

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on July 28, 1988, at Los Angeles, California



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